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IN THE

Supreme Court of the United States

October Term, 1955

No._____

EVERETT V. COOPER AND GEORGE GALE COOPER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Notice is hereby given that Everett V. Cooper and George Gale Cooper, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the United States Court of Appeals, 5th Circuit, entered on the 23rd day of January, 1956, when the Motion for Rehearing was denied. The original judgment was entered May 20, 1955 in District Court.

This Appeal is taken pursuant to 28 *USC*, Sec. 1254(1).

Appellants were convicted of conspiring to acquire, transfer and traffic in marijuana, in violation of 18 *USCA*, Sec. 371, and of possession of marijuana upon which the transfer tax had not been paid in violation of 26 *U.S.C.A.*

2744, and the Appellant, Everett V. Cooper was sentenced to five years at hard labor on the conspiracy charge, and four years at hard labor on the possession charge; and to pay a fine of $1,000.00; and Appellant George Gale Cooper was sentenced to three years at hard labor, and to pay a fine of $250.00 generally on the counts of both conspiracy and possession. The Appellant George Gale Cooper is currently confined at the Federal Penitentiary of Texarkana, and the Appellant Everett V. Cooper is currently at large on bail in the sum of $25,000.00.

This writ is sought primarily for the insufficiency of evidence regarding the conviction of George Gale Cooper as to both counts and to Everett V. Cooper for the count of possession.

The following questions are presented by this appeal:

1. The evidence does not support the verdict of the jury, or, the trial court erred in failing to grant Appellants' Motion for an Instructed Verdict of Not Guilty.

No single Government witness placed the appellant George Gale Cooper in a conspiracy, or indeed, anywhere near the alleged conspirators themselves. The only reason that George Gale Cooper was filed on on this case was because he was found on the premises near two small shacks which contained the marijuana mentioned in Counts 2 and 3. The two Government witnesses (R. 53 and 697) placed George Gale Cooper at the farm for the express purpose of feeding some pigs, and the only care, custody and possession By George Gale Cooper was of pigs and not of marijuana. The entire record is free of any criminal action or alleged conspiracies of George Gale Cooper. No witness can show

by word or deed or action that George Gale Cooper had any idea that the "old shack" contained any marijuana and the Government witnesses negated George Gale Cooper in the whole case from start to finish, and his whole case, as portraited by the Government, is his few minutes on the farm feeding these pigs. The case of *Bridges v. United States*, 199 F. 2d 811, said in part, "It requires more than proof of a mere passive cognizance of a crime on the part of the Defendant to sustain a charge of conspiracy to commit it; and you must find that the Defendant did some act, or made some agreement showing an intention to participate in some way in such conspiracy? Based on this, Appellants believe that the Motion in Proposition No. 1, should have been sustained for George Gale Cooper.

There was *no evidence* to convict Everett Cooper of *possession!*

From the outset the Government made every attempt to connect the actions of Everett (Cap) Cooper with those of John Ellis Sutton, who during the trial plead Guilty. Criminal conspiracy may be established by circumstantial evidence, and overt acts, and circumstances of which they were committed may be considered *with other evidence* in support of the conspiracy charge. *Nilva v. United States*, 212 F. 2d 115.

In the case of *Pearson v. United States*, 192 F. 2d 681, 692, Pearson and three Co-Defendants were tried for hijacking a truck load of whiskey. All four were convicted on circumstantial evidence and all appealed. The Court in reversing as to all, except Pearson himself said, "From the record before us, the conclusion is inescapable that Pearson was the only person who exercised any *control, dominion,* or *authority* over the liquor in question." This case cited

Justice Minton who said, "To possess means to have actual control, care and management over, and not a passing control, fleeting and shadowy in its nature". This case further incorporated the holding of *United States v. Curzio,* 170 F. 2d 354, which said that possession should be defined to the jury as a matter of control. No control has been shown by either Appellant. *Everett V. Cooper had not been on the premises since September of 1952* (R. 579) *and we cannot surmise that he was ever on the premises again.* The record must speak for itself. Everett Cooper did not *know* that the marijuana was there. The word "possession" in the Statute forbidding the possession of a narcotic means an immediate and exclusive possession under the dominion, and control of Defendant, and its physical control with the intent to exercise control, and a Defendant having such control *must have knowledge of the presence of a narcotic,* and such knowledge must precede the intent to exercise, or the exercising of such control. *People v. Cory,* 170 P. 2d 433, 436. *People v. Martinez,* 256 P. 2d 1028, 1032. Surely the possession count as to Everett V. Cooper must be reversed for insufficient evidence. The gist of the offense of conspiracy is agreement among the conspirators to commit an offense, attended by an action of one or more of the conspirators to effect the object of the conspiracy. *United States v. Falcone,* 311 U.S. 205, 210, 61 S. Ct. 204, 207, 85 L. Ed. 128. Further, the (5th Cir.) case of *Macreth v. United States,* 103 F. 2d 495, 496 said: "To support the charge of conspiracy, the *intent to conspire* must be shown". Everett V. Cooper met once with George and Ruth Hall in Houston (R. 326, 641) and once in New York (R. 648). "Presumptions of guilt are not lightly to be indulged from mere meetings". *United States v. Di Ri,* 332 U.S. 581, 68 S. Ct. 222. The record is void of secret

meetings, and the Motion for the directed verdict of acquittal should have been granted for both Appellants. In light of *Pollack v. United States* (5th Cir.), 202 F. 2d 281, we believe that no case of alleged conspiracy was shown by the Government and further, there was no proof whatsoever of the substantive counts, and therefore, ALL COUNTS should be reversed.

2. The Trial Court erred in failing to instruct the jury to disregard the testimony and exhibits of witnesses when such were not pertinent to these Appellants, and never connected to them.

All through the Trial, the Government was permitted by the Court to allow testimony and exhibits to be introduced in evidence when both had no connection whatsoever to the Appellants herein. At the close of the direct examination of each Government Witness, the Appellants asked the Court to instruct the jury to disregard both the testimony and the exhibits as the Appellants had no connection with same. The testimony was largely of admitted conspirators who were already and currently serving prison sentences.

In a conspiracy prosecution, declarations that are admissible as against all of the alleged conspirators, and declarations that are admissible only as to the declarant, and those present, who, by their silence, or other conduct are assent to the declaration must be *carefully and clearly limited by the Court at the time of their admission* and the jury must be instructed as to such declarations and the limitations put upon them. *Lutwak v. United States*, 73 S. Ct. 481, 344 U.S. 604, 97 L. Ed. 593. Lutwak and two others were indicted for conspiracy regarding the illegal entry

into this country of three aliens as spouses of honorably discharged veterans. A certain conversation pertaining to one named Defendant was admitted as to all Defendants. The Trial Court said that in the trial of a criminal case for conspiracy, it is inevitable that there shall be, as here, evidence as to declarations that are admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present, who, by their silence or other conduct, assent to the truth of the declaration. *Therefore these declarations must be carefully and clearly limited by the Court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them.* This case concurred with the S. Ct. case of *Krulewitch v. United States,* 69 S. Ct. 723. The *Lutwak* case held the question as being harmless and affirmed, but in this Cooper Appeal, the error was not harmless as Rule 52 (a) of the *Federal Rules of Criminal Procedure.*

In *Blumenthal v. United States,* 68 S. Ct. 248, the Court concurred with the reasoning of the admissability as to the declarant only. The *Blumenthal* case limited the declarations in the alleged conspiracy by the Court's ruling and subsequent instructions to only those Defendants present at the declaration. All the Government Exhibits were introduced for a limited purpose against specific Defendants, Appellants not included, to be connected later as to all the Defendants. There never was a later connection to these Appellants.

3. The Trial Court erred in permitting a Deed in evidence purporting to connect the Appellants herein with ownership of premises where marijuana was found.

The prosecutor offered as evidence a certified Deed to the property known as the Thomas F. Cooper Estate (R. 507) and the same was objected to (R. 508, 704). The Government's case of possession of marijuana was so weak at this time that the prosecutor was attempting to bolster the Government's position by trying to show ownership of the land, where the marijuana was found, by the Appellants herein. There is no connection between the aforementioned estate and the Appellants and the Deed was improperly introduced. *United States v. Sprengel* (3 Cir.), 103 Fed. 2d 876, held that proof of extraneous prejudicial matters that had no connection with the Defendant were prejudicial to the rights of the Defendant in criminal cases.

The Deed in evidence is the only minute connection to the Appellants herein on the substantive count of possession. Neither Appellants name is on the deed and the mere fact of the similarity of the last names is insufficient.

4. The Trial Court erred in permitting highly inflammatory and prejudicial testimony regarding large quantities of marijuana being destroyed by Government authorities when such was never pertinent to, nor connected to these Appellants.

5. The Trial Court erred in permitting a Government Witness to testify without restriction to a large sum of money found on one John Ellis Sutton in New York, same not pertinent to Appellants, nor ever connected to them.

6. The Trial Court erred in permitting Saunders and McClendon to testify to illicit marijuana dealings in New York when such, if true, was never pertinent to Appellants, and never connected to them.

With permission of the Court, Appellants will Brief the above three similar propositions together. The Appellants herein feel that the minds of the jurors were prejudiced against the Appellants herein when over objection (R. 610), the Government was permitted to show the destruction of the 684 grains of marijuana. Also, the Appellants herein feel that any showing of other crimes are, in fact, collateral offenses unconnected with these alleged Counts in the indictment, and should have been prohibited. See *Johnson v. United States*, 63 S. Ct. 549, 318 U.S. 189; such evidence as contained in the aforementioned points of error should be excluded when the risk of confusion therefrom upsets the balance of advantage thereof. *Shepherd v. U S.*, 54 S. Ct. 22, 290 U.S. 96.

The witness McClendon testified that he did not know the Coopers (R. 511) and the Appellants asked to instruct the jury to disregard such testimony (R. 601) in evidence and objected to (R. 604) which had to do with the sale and handling of marijuana, but the jury was permitted to hear it all.

Government witness Belmont (R. 628) testified he removed $9,265.00 from the Defendant, John Ellis Sutton, in New York. Both Coopers objected to the testimony (R. 629), but the Court overruled the objection. This inflammatory testimony was used for the sole purpose of an impression on the jury as to the size and scope of the alleged conspiracy. Neither Appellant was connected.

7. The Trial Court erred in permitting several smaller, separate, alleged conspiracies to be shown by the prosecution when none involved the Appellants herein in any one general scheme of events.

The Appellants contend that there is no connection between the actions of Willie Winn (R. 124-125) and the Appellants. The objection was overruled (R. 127). The Appellants further contend there is no connection between the actions of McClendon and Saunders, George and Ruth Hall, and the Appellants herein. Rather the Government proved a series of disconnected, single events and crimes that had no bearing and no relevancy on the general scheme of the conspiracy as alleged in Count #1. In the (5th Cir.) case of *Brooks v. U. S.*, 164 F. 2d 142, fourteen Defendants were charged in one Count with a single conspiracy. The Appellants insisted that while there might be several separate smaller conspiracies, the proof failed to show one general conspiracy. The Court, in reversing the conviction, cited again the case of *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, which held that where one general conspiracy is charged, proof of several separate conspiracies constitutes a variance, and that the harmless error rule, *Jud. Code*, Sec. 269, 28 *U.S.C.A.*, Sec. 391, will not save a reversal where it is not made clear that no prejudice has resulted from the error.

The Court in the *Brooks* case went on to say that, "It is equally clear, however, that while the proof tends to connect some of the Defendants, in a common conspiracy, it completely fails to connect others of the Defendants with that conspiracy. On the contrary, it tends to show the existence of and to connect some of the Defendants with, entirely separate and distinct conspiracies. The record standing thus, while it would have been entirely permissible to have tried all these persons and all these conspiracies together in one indictment in several counts under *Rev. St.*, Sec. 1024; 18 *U. S. C. A.*, Sec. 557, it was reversible error

to send them all to the jury under an indictment in one count charging one general conspiracy".

Kotteakos v. U. S., 66 S. Ct. 1239, 328 U.S. 750. The sole question in this Supreme Court case is whether petitioners have suffered substantial prejudice from being connected to a single general conspiracy by evidence which the Government admits proved not one conspiracy, but some eight or more. Certiorari granted because of the importance of the question for the administration of criminal justice in the Federal Courts. Here 32 persons were indicted, 19 brought to trial and 13 submitted to the jury. Those convicted appealed under the "harmless error" statute, same affecting their substantive rights and not merely a technical error. In finding many separate conspiracies, the High Court said, "They do not invite mass trial by their conduct, nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution, but our Government is not one of mere convenience, or efficiency. It too, has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth".

8. The Trial Court erred in permitting evidence on Count 4 of indictment regarding possession of marihuana by John Ellis Sutton to be heard when none of this evidence led to Appellants and same being highly inflammatory and prejudicial.

There is no single scheme between George Gale Cooper and Everett V. Cooper and John Sutton. George Cooper had never been seen with John Ellis Sutton and there is

nothing in the record to connect the two. In the case of *U. S. v. Falcone,* 109 F. 2d 579, the prosecutor tried to show that 22 illicit stills were operating in concert and that Falcone, as a sugar supplier, was involved in the entire alleged conspiracy because of his supplying sugar to a few persons seemingly connected with all the stills. The Court reversed as to Falcone and Judge Learned Hand in his decision said, "That so much illegal distilling might predispose the jury to assume that *all* the accused were connected with it." He further said that, "There was instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not *forbear to do* that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. He must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments, that they can be avoided."

Further, the Government was permitted to show the purchase of a Cadillac by John Ellis Sutton (R. 263), same never being connected to any alleged conspiracy and never connected to Appellants herein (R. 263), but tended to prejudice the jury.

The possession of marihuana in Count 4, of the indictment by John Ellis Sutton was irrelevant and immaterial to the alleged possession of marihuana between Appellants. At the very outset of the trial (R. 21) the Appellants,

Everett V. Cooper, moved the Court for a severance of Counts in the indictment as well as for a severance of Defendants. The Appellants, Everett V. Cooper, would have been protected from the errors as shown in this Proposition had he been tried separately from John Ellis Sutton.

Conclusion

The whole record is noticeably void of any evidence whatsoever tending to connect the Appellant, Everett V. Cooper, with possession of marijuana. His activities as described by the alleged co-conspirators were ended, as far as the place where the marijuana was found, at least ten months prior to the finding of same. Everett V. Cooper was not on the premises when the marijuana was confiscated, had not been since July of 1952, and the record does not show how long the 106 pounds of marijuana and the grains of same were on the premises. No connection.

The Government witnesses were unanimous in their testimony regarding Appellant, George Gale Cooper. He obviously took no part in this conspiracy, and his only connection in the possession count is his physical presence on the premises when and where the marijuana was confiscated. He was in the act of feeding his pigs at the time. In view of the foregoing, the Trial Court finding of guilty should be reversed in all counts, as should the decision of the U. S. Court of Appeals for the Fifth Circuit. Appellants herein pray that this Petition for Writ of Certiorari be granted.

SCARDINO AND REGNIER

By _____

ROBERT A. SCARDINO
612 Chronicle Bldg.
Houston, Texas

I, C. ANTHONY FRILOUX, Assistant United States Attorney, hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States this_____day of_____, 1956.

_____

C. ANTHONY FRILOUX

JUDGMENT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15632

EVERETT V. COOPER, GEORGE GALE COOPER AND NATHAN JOHNSON, *Appellants*,

VERSUS

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(December 16, 1955)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

PER CURIAM: The appellants, Everett V. Cooper, Nathan Johnson and George Gale Cooper, were convicted on an indictment charging them, along with a number of

others, in one count with violating Section 371 of Title 18 U.S.C.A. by conspiring to acquire, transfer, and traffic in marijuana without registering, without paying the transfer tax, not in pursuance of a form issued by the Secretary of the Treasury and with knowledge that the marijuana had been smuggled into the United States. Everett V. Cooper and George Gale Cooper were also indicted on two other counts charging them, along with two others, with possession of marijuana upon which the transfer tax had not been paid in violation of 26 U.S.C.A. 2744. Although appellants argue numerous points, we regard only one question worthy of discussion—whether the evidence supports the verdict of the jury,—finding no merit in the other errors alleged.

The record as a whole and with regard to all the defendants below reveals a conspiracy involving twenty or more persons in this country and in Mexico who were organized for the purpose of smuggling marijuana into the United States and selling it in the large market area of New York and elsewhere. The marijuana was brought from Mexico to the Cooper farm in Texas where it was processed, packaged and stored until it was transported to the East by air or automobile. The various defendants either acted as managers of the illegal operations or participated in one or more of the activities included in the conspiracy. The evidence establishing the scheme and the participation of the individual defendants was elicited primarily from federal narcotics agents or members of the conspiracy who were not indicted and who testified for the Government. The testimony of these witnesses was consistent and harmonious and painted a picture of a large and well organized narcotics ring.

We find overwhelming evidence to support the verdict of the jury that Everett V. Cooper was guilty of the conspiracy charge; in fact, it was shown that he held a position of leadership and authority in the "organization". With regard to his conviction on the count of the indictment charging possession of the marijuana in question, we find credible evidence of this appellant's dominion and control of that marijuana sufficient to support a verdict of guilty on these counts. Even though Everett was not on the Cooper farm at the time the marijuana was found there, and he said that he had not been on the farm for some months, the record shows that he was one of the owners of the farm and "knew" that the marijuana was being stored there, that he had participated in processing and packaging marijuana for shipment to the East, and that he had one of the few keys to the building on the farm in which the drug was being stored.

As to the jury's verdict against George Gale Cooper, although the evidence was largely circumstantial, there was enough to go to the jury and support its findings. George and another defendant, Ed Riley, were caretakers at the Cooper farm. Testimony by the narcotics agent who overheard a conversation between George Cooper and Riley clearly indicated that both of these men were aware of the illicit operations and knew of and controlled the marijuana while it was being stored. There was also evidence tending to show that this appellant was an active participant with some authority in the conspiracy. We believe this evidence was sufficient to warrant the jury's verdict.

Finally, we find that the evidence connecting Nathan Johnson with the conspiracy is overwhelming and fully supports the verdict as to him. He helped to arrange and

actually made sales of marijuana in New York for this narcotics ring.

Since we find no substance in the other alleged errors, further discussion is unnecessary and the judgment of the District Court is hereby

AFFIRMED

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.

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